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In the Supreme Court of the United States

OCTOBER TERM, 1994

ORION A. RUST, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the military judge erred to the prejudice of the petitioner by admitting the testimony of Captain Carranza and Prosecution Exhibit 5, privileged attorney-client matters, without petitioner's consent.

Whether the military judge erred, to the prejudice of the petitioner when he denied petitioner's motion to suppress petitioner's statements to Captain Carranza and petitioner's written notes which were part of a quality assurance record and therefore should not have been admitted at his court-martial.

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PETITION FOR WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Orion A. Rust, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Armed Forces entered in his case on April 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at 41 MJ 472 (1995) (Appendix A). The unpublished opinion of the United States Air Force Court of Military Review, issued on August 24, 1993 is attached (Appendix B).

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 6 April 1995. The jurisdiction of this Court is invoked under 28 USCA § 1259(3) (Supp. 1992) and 10 USCA § 867(a) (Supp. 1992).

STATEMENT OF THE CASE

The petitioner, a military doctor, was convicted of dereliction in the performance of his military duties by willfully failing to report to the Castle Air Force Base Emergency Room when purportedly required to do so; failing to examine a patient, Ms. S when notified by a civilian contract physician, Dr. Canga, that she was in distress; and failing to provide proper medical care to Ms. S as it was his duty to do. He was also convicted of making a false statement to the Castle Air Force Base claims officer, Captain Carranza, in January of 1991, concerning these latter incidents.

In early January 1991, Capt. Carranza travelled to and sought out petitioner in his office. He introduced himself as the Castle Air Force Base Hospital's lawyer who would assist petitioner should he be sued under the Federal Tort Claims Act (FTCA). He did not advise petitioner that any statements he made could be used against him in a subsequent court-martial.

The false official statement charge centered around comments allegedly made by the petitioner to Captain Carranza during this interview/conversation, that is, that petitioner told Ms. S. that he wanted to admit her to the hospital, but that she refused to be admitted.

At trial, petitioner moved to suppress his statements to Captain Carranza on the basis that their mutual communications were protected by the attorney-client privilege and therefore could not be disclosed absent petitioner's consent or waiver. In the alternative, petitioner's position was that these

statements were protected from disclosure as a quality assurance record. The military judge denied the defense motions and admitted the content of these communications in the form of testimony by Capt. Carranza and his authentication of petitioner's written notes (Prosecution Exhibit 5).

REASONS FOR GRANTING THE WRIT

I. THE MILITARY JUDGE ERRED, TO THE PREJUDICE OF THE PETITIONER, BY ADMITTING THE TESTIMONY OF CAPTAIN CARRANZA AND PROSECUTION EXHIBIT 5, PRIVILEGED ATTORNEY-CLIENT MATTERS, WITHOUT PETITIONER'S CONSENT

The military judge erred in admitting the testimony of Captain Carranza concerning what petitioner told him and further erred by admitting Prosecution Exhibit 5, petitioner's notes as written; all written and verbal communications between petitioner and Captain Carranza were privileged. As noted *supra*, Captain Carranza, when he sought out petitioner, advised petitioner that he was an attorney who would assist him in specific legal matters should he be sued under the FTCA, to include having the case removed from state to federal court, the substitution of the United States as a party defendant in the event of an action brought under the FTCA, and the investigation of the underlying circumstances surrounding any potential failure by petitioner to meet the standard of care. R. 92-95.

With the information and explanation provided to him by Captain Carranza, petitioner was under the justifiable, good faith belief that he was consulting with a lawyer with a view toward obtaining legal services and, consequently, he communicated confidential information to Captain Carranza while under this belief. *See* petitioner's exhibit 1, Affidavit of peti-

tioner dated 21 September 1992 at p. 4-5. Petitioner reasonably believed that Captain Carranza was his attorney, representing his interests, and he was not given any indication to the contrary. During their conversation, no effort was made by Captain Carranza to inform petitioner that he was not petitioner's counsel. Captain Carranza did not inform petitioner that he was not petitioner's counsel. Captain Carranza did not inform petitioner that there was no attorney-client relationship between them (R. 97), and during the Article 32 investigation, he testified that he assumed petitioner believed him to be his attorney. R. 96.

Military Rule of Evidence 502 provides that "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. . ." Military Rule of Evidence 502(b)(1) defines a "client" as "a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer." The party invoking the attorney-client privilege has the burden of proving that the lawyer-client relationship existed and that the communications in question were confidential. *United States v. Schaltenbrand,* 930 F.2d 1554, 1562 (11th Cir. 1991). To be protected by the privilege, the communication must be made to the lawyer confidentially, in his professional capacity, for the purpose of securing legal advice or assistance. *Id.* The pivotal question is whether the client reasonably understood the exchange to be confidential. *Kevlik v. Goldstein,* 724 F.2d 844, 849 (1st Cir. 1984). The fact that an attorney may have instructions from superiors as to the scope of his representation during that relationship does not remove the fact of the confidential relationship nor does it in any way prevent the

establishment of the relationship if the individual has a reasonable belief that what he says to the legal adviser is disclosed in confidence. *United States v. Hustwit,* 33 M.J. 608 (NMCMR 1991).

Whether a lawyer-client relationship exists when a communication has been made to an attorney is a question of fact. *United States v. Gandy,* 9 USCMA 355, 361, 26 CMR 135, 141 (1958); *United States v. Costanzo,* 625 F.2d 465 (3d Cir. 1980). In making the final determination as to whether the communication in question was privileged, the military judge should resolve any doubt in favor of the accused. *Gandy, supra.* The United States Court of Appeals for the First Circuit agrees with the proposition that the client's reasonable understanding is paramount in determining whether or not a given communication was privileged. *United States v. Bay State Ambulance and Hospital Rental Service, Inc,* 874 F.2d 20 (1st Cir. 1989).

In this case, it is clear that, based upon the evidence submitted to the military judge, to include Captain Carranza's own admissions that he told petitioner he would be working on petitioner's behalf during their initial consultation (R. 94-5), the military judge's ruling that the exchange between petitioner and Captain Carranza was not privileged was clearly erroneous and contrary to established precedent and public policy.

II. THE MILITARY JUDGE ERRED, TO THE PREJUDICE OF THE PETITIONER, WHEN HE DENIED PETITIONER'S MOTION TO SUPPRESS PETITIONER'S STATEMENTS TO CAPTAIN CARRANZA AND PETITIONER'S WRITTEN NOTES WHICH WERE PART OF A QUALITY ASSURANCE RECORD AND THEREFORE SHOULD NOT HAVE BEEN ADMITTED AT HIS COURT-MARTIAL

Petitioner's statements to Captain Carranza, more fully described above, were part of a medical quality assurance record as defined by 10 U.S.C. 1102(i)(2) and as such were privileged and should only have been disclosed, if at all, upon proper written request by the petitioner. Consequently, the trial judge erred as a matter of law by denying the defense motion to suppress these statements.

The privilege established by section 1102 extends to records as well as to testimony by those involved in a quality assurance program, barring disclosure except in certain limited circumstances. *In re United States,* 864 F.2d at 1154; *see also* 10 U.S.C. 1102(c) (listing exceptions). The Congress established a prohibition against the use of quality assurance records unless certain precise statutory requirements are met. While there is no bar to prosecution envisioned by the statute, records may only be produced at trial pursuant to the statutory scheme. Exception (c)(F) of 1102 is applicable to the instant case:

> (c) . . . [A] medical quality assurance record . . . may be disclosed . . . and a person . . . may give testimony only as follows:
>
> (f) . . . To a criminal or civil law enforcement agency or instrumentality . . . if a qualified representative of such agency or instrumentality makes a *written request* that such record or testimony be provided for a purpose authorized by law.

10 U.S.C. 1102(c)(F) (emphasis added). No such written request was ever made. Because the trial judge incorrectly determined that petitioner's statements to Capt. Carranza were not part of a medical quality assurance record, R. 91, he never considered the fact that the Government had not complied with the precise requirements of section 1102. By admitting the statements that Dr. Rust made to Captain Carranza, he erred as a matter of law.

Recognizing the importance of medical quality assurance programs as a means of monitoring and ensuring that quality medical care is provided to Department of Defense beneficiaries, Congress enacted 10 U.S.C. 1102 to guarantee the confidentiality of records and communications prepared as part of a quality assurance program. *In re United States,* 864 F.2d 1153 (5th Cir.) *reh'g denied,* 869 F.2d 1487 (5th Cir. 1989). As with attorney-client discussions, quality assurance assessments require absolute candor and openness by those providing information or rendering opinions, often possible only when an individual is secure in the knowledge that his statements are made "in an environment of confidentiality." *Id.*

The circumstances of obtaining of petitioner's oral and written statements in early January 1991 demonstrate that they were taken by Capt. Carranza in his official capacity as a quality assurance claims officer as part of a quality assurance investigation. At the initial Article 39(a) session, Captain Carranza testified that he initiated contact with petitioner when he was told in late December 1990 by the outprocessing claims officer, that he should "get on the case," (R. 60) to "investigate . . . a possible potential claim under the Federal Tort Claims Act." R. 61. Prior to speaking with petitioner, Captain Carranza followed the advice of Captain Whitmore, and began "pulling together the files" to start an investigation. R. 61. Captain Carranza then went to speak with petitioner.

At trial, Captain Carranza testified that his conversations with petitioner were part of a quality assurance program. Captain Carranza asked petitioner for a copy of petitioner's written notes. R. 459. He further testified that he took the notes in his official capacity as the claims officer investigating the potential medical malpractice claim, and that he was "going to put it in [his] report." R. 460. Captain Carranza's meeting with petitioner and the taking his oral and written statements were thus part of a quality assurance investigation already under way and the statements became part of the quality assurance record.

Based on the facts as presented in Capt. Carranza's testimony both at the Article 39(a) session and a trial, it is clear that petitioner's statements were part of a "medical quality assurance record." The quality assurance program includes any activity carried out to assess the quality of medical care, including risk management. *See* 10 U.S.C. 1102(j)(1). Further, subsection (j)(2) contains no requirement that a statement be solicited by an investigator to qualify as part of a quality assurance record. As long as the statement is part of the "proceedings, record, minutes, and reports that emanate from quality assurance program activities," is considered part of the record. *Id.* at 1102(j)(2).

Not only did Captain Carranza request a copy of petitioner's notes while acting in his official capacity, he explained that they would be included in a further review process. At the time of this request, Captain Carranza was concerned primarily with risk management and reducing the exposure of the hospital and the Government to a claim under the Federal Tort Claims Act. This is exactly the type of situation envisioned by Congress to require the candor and truthfulness fostered by confidentiality. Because petitioner's statements were privileged statutorily and no written request for disclosure was made in accordance with the statute, the statement were improperly admitted into evidence and cannot, therefore support a conviction for making a false official statement.

CONCLUSION

The questions presented are genuinely important and affect not only petitioner, but the rights of countless medical practitioners, both in the military and in the civilian communities. The military judge clearly abused his discretion with regard to his determination concerning the existence of an attorney-client relationship and the applicability of 10 U.S.C. 1102 to the case at bar. The petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari and remand to the United States Court of Appeals for further consideration.

Respectfully submitted,

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June 1995

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

No. 94-5001
CMR No. 29629

UNITED STATES, APPELLANT AND CROSS-APPELLEE

v.

ORION A. RUST, MAJOR U.S. AIR FORCE,
APPELLEE AND CROSS-APPELLANT

Argued January 10, 1995
Decided April 6, 1995

Counsel

For the Accused: *Barry P. Steinberg* (argued); *Michael E. Reheuser, Colonel Jay L. Cohen, Captain Eric N. Eklund* (on brief).

For the United States: *Colonel Jeffery T. Infelise* (argued); *Captain Jules D. Silberberg* (on brief); *Colonel Thomas E. Schlegel.*

Military Judge: William C. Thompson

Opinion of the Court

GIERKE, Judge:

1. A general court-martial convicted Major Rust, contrary to his pleas, of dereliction of duty and making a false official statement, in violation of Articles 92 and 107, Uniform Code of

Military Justice, 10 USC §§ 892 and 907, respectively. The approved sentence provides for a dismissal, a $5000.00 fine, and a reprimand. The Court of Military Review affirmed the findings of guilty but set aside the sentence. 38 MJ 726 (1993). The Judge Advocate General of the Air Force certified the following questions to this Court for review:

I

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED WHEN IT HELD THAT PROSECUTION EXHIBIT 18, THE MURDER-SUICIDE NOTE OF MR. [A], WAS ERRONEOUSLY ADMITTED DURING THE PRESENTENCING HEARING AS EVIDENCE IN AGGRAVATION OF THE OFFENSE OF DERELICTION IN DUTY.

II

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED WHEN IT FAILED TO FIND THAT ANY ERROR IN ADMITTING PROSECUTION EXHIBIT 18 WAS HARMLESS.

2. We granted review of the following issues raised in the cross-petition:

I

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING THE TESTIMONY OF CAPTAIN CARRANZA AND PROSECUTION EXHIBIT 5, WRITTEN NOTES PROVIDED BY [MAJ RUST] TO HIS COUNSEL, AS VIOLATIVE OF [MAJ RUST]'S PRIVILEGE IN ATTORNEY-CLIENT MATTERS.

II

WHETHER [MAJ RUST]'S ORAL STATEMENTS AND WRITTEN NOTES TO CAPTAIN CARRANZA WERE

PART OF A QUALITY ASSURANCE INVESTIGATION AND THEREFORE INADMISSIBLE.

III

WHETHER [MAJ RUST] WAS DENIED A FAIR TRIAL BY VIRTUE OF THE TRIAL COUNSEL'S IMPROPER CONDUCT.

IV

WHETHER THE MILITARY JUDGE ERRED, TO THE PREJUDICE OF [MAJ RUST], BY ADMITTING PROSECUTION EXHIBIT 18, THE MURDER SUICIDE NOTE OF MR. [A], OVER DEFENSE OBJECTION.

Factual Background

3. Mrs. S, the pregnant spouse of an Army enlisted member, went to the emergency room of the Castle Air Force Base, California, hospital on December 24, 1990, suffering from vaginal bleeding. She said that she "felt" as if her baby's head was "coming out of her . . . vagina." She was examined by Dr. Manuel Canga, a contract physician. Dr. Canga called Maj Rust, the on-call obstetrician, and described Mrs. S's symptoms. Dr. Canga testified that Maj Rust advised him to have Mrs. S return home, get bed rest, and return to the hospital if she had any other complaints.

4. Mrs. S returned on the evening of the next day, December 25, and again saw Dr. Canga. He again called Maj Rust and described Mrs. S's complaints. Maj Rust asked to speak with Mrs. S on the telephone. What was said over the telephone was disputed at trial. Mrs. S's mother testified that Mrs. S was upset after the telephone conversation because appellant would not come to the hospital to examine her and admit her. Maj Rust testified that he told Mrs. S to remain at the hospital so that he could come to the hospital and admit her but that Mrs. S refused

to be admitted and left the hospital. The charge of dereliction of duty was based on Maj Rust's alleged failure to come to the hospital, examine Mrs. S, and admit her.

5. Mrs. S left Castle Air Force Base hospital and returned home. She then went to a local civilian hospital, where she was diagnosed as being in premature labor. Because the local hospital was not equipped to handle a premature birth, Mrs. S was transferred to Valley Medical Center in Fresno, California, where she gave birth to a premature baby boy, who died on December 28.

6. On December 29 or 30, Robert A, Mrs. S's lover and the father of the premature baby, strangled Mrs. S to death and then committed suicide by shooting himself. A suicide note was found with their bodies. The note reads as follows:

12-29-90

> She was hurting so bad because the baby died. She wanted to be with it and so did I. We are going to be with the ones we love in the name of Jesus Christ we die for him. And no longer will we be a burden on our parents or society. We loved each other very much But nobody really cared to help us or love us as we were. The time has come to go home to God. Who will accept us as we are and Knows what is in our hearts. We wanted peace love and fellowship but we could and did not know how to cope with all the rejection that followed. We do not wish to be *embalmed* we want to be remembered as two people who loved each other so much that we wanted to be together in eternity. Time will past and the hurt you feel will cary on. But ask yourself what was so wrong that we found misery and unhappiness at every turn. She wanted to die. She told me so. She asked me to help her. And I did what she wanted. She and I love

our parents very much but we grew to be a burden on them both. We wanted peace and acceptance from everyone involved but they would not let it be. So as time goes on you will see that what really matters is love and love alone. The baby died and he, John Christopher [a), My only child and it hurt us very deeply in the depth of our souls. How can we express the sorrow of what we've done. It will weigh heavily on the hearts we left behind. But, only burden and misery followed us wherever and whenever we lived. Now I ask for you Salvator [A] and Teesa [A], James [B] and Jayne [B] to forgive and pray for us. For we truly loved one another and if you both (family's) could have seen and recognize that maybe things could have been different. To Jesus Christ we three give our spirit.

God love you all, pray for us and the baby.

It is accomplished.

[Unsigned]

7. The suicide note was received in evidence over defense objection during the sentencing hearing. The Court of Military Review held that the military judge erred by admitting the suicide note. 38 MJ at 734. This holding is the basis of the two certified issues and granted Issue IV.

8. On December 26, Dr. Canga mentioned Mrs. S's case to Colonel (Col) Ortaliz, Chief of Hospital Services, Castle AFB Hospital, opining that "Dr. Rust should have come and seen the patient." As Chief of Hospital Services, Col Ortaliz was responsible for risk management and quality assurance. On December 26th "or on a later date," Col Ortaliz asked Maj Rust about Mrs. S. He testified that he did not suspect Maj Rust of a criminal offense. Col Ortaliz testified that Maj Rust told him that "he wanted the patient to get admitted but the patient refused

admission." The military judge admitted Maj Rust's oral statement to Col Ortaliz over defense objection. Before this Court, Maj Rust has not contested admission of his statement to Col Ortaliz.

9. Lieutenant Colonel (Lt Col) Pohl, the hospital commander, testified that in early January 1991, he received a telephone call from the Vice Wing Commander, advising him of a "potential risk management issue." He reviewed the emergency room records for December 24 and 25 and became concerned about inadequate documentation of Mrs. S's treatment. Lt Col Pohl testified that he did not suspect Maj Rust of a criminal offense, but only suspected "that we had poor documentation of the incident."

10. Lt Col Pohl discussed the treatment of Mrs. S with Maj Rust on January 3. He asked Maj Rust "to tell me his account of what had happened and he did so." He testified that Maj Rust told him that he had "attempted to convince" Mrs. S "to come in to the hospital," that he was unsuccessful, and that "he made arrangements with her verbally to come in the following morning to be seen in the clinic and to have an ultrasound done of the pelvis." Lt Col Pohl testified that he suggested to Maj Rust "[t]hat it would be certainly appropriate for him to make sure that his documentation was done to cover his involvement in this case." The military judge suppressed evidence of Maj Rust's oral statements to Lt Col Pohl, on the ground that Lt Col Pohl should have treated Major Rust as a suspect and advised him of his rights under Article 31, UCMJ, 10 USC § 831.

11. Captain (Capt) Carranza, the Castle Air Force Base claims officer, testified that his predecessor had advised him during the last week of December that there had been an "incident at the hospital on the 24th and 25th of December involving [PS] and that I should get on the case since [his predecessor] was leaving." On January 3, 1991, Capt Carranza was at the hospital picking up medical records for an unrelated

case when the patient affairs administrator suggested that he introduce himself to Maj Rust. The purpose of the introduction was "so he knew who I was and what we did and how the Air Force took care of these things." In response to direct examination by trial counsel, Capt Carranza described his conversation with Maj Rust as follows:

> I told him my name, told him where I worked, told him that I was basically the hospital's lawyer, that my job was to investigate the potential claims under the Federal Tort Claims Act.
>
> * * *
>
> . . . I told him how the whole process worked, basically that I gather the information and I write the report and that will go to the medical law consultant at Travis. He would send all the information that I sent to him—he'd consult with experts in the field at the medical center up at Travis, write his own report, and then everything would go to Headquarters Air Force for their determination as to whether to settle or not settle or—like that.

12. When trial counsel asked Capt Carranza if he told Maj Rust that his claims investigation would be disclosed to other Air Force officials, Capt Carranza responded:

> Yes. I did that for one reason. Just because—a lot of the things that—we understand that the doctors—so that they know that there are other doctors looking at this stuff. It is not a bunch of lawyers [deciding] whether they did something or not.

13. At the time of his conversation with Maj Rust, Capt Carranza "had not reviewed the medical records." He testified that he did not advise Maj Rust of his rights because "[i]t was not a criminal matter at all." He did not approach Maj Rust to

discuss Mrs. S's case, but merely to introduce himself. When the military judge asked Capt Carranza if he intended "to conduct any interview of Dr. Rust at all," Capt Carranza responded, "I was completely ill-prepared to conduct an interview, sir. I just wanted to tell him who I was so he would know my face when I came around again."

14. Capt Carranza testified that when he entered Maj Rust's office, Maj Rust had a handwritten statement in his hands. He told Capt Carranza that "he had been writing it all down so he could refresh his memory so he would not forget." Capt Carranza testified that Maj Rust told him "that he had been very rattled by the whole thing." When Maj Rust said that "[h]e had never been involved in a case where someone had died," Capt Carranza "told him that really was not part of the claims investigation at all and that I did not think he had really anything to do with that part of it. It really just happened after his involvement ended."

15. Maj Rust then read the statement to Capt Carranza and later gave him a copy. Capt Carranza could not remember whether he asked for a copy or Maj Rust just volunteered it.

16. On cross-examination, Capt Carranza testified that he told Maj Rust that he "would be investigating" any "medical malpractice claim" and that, if Maj Rust were sued individually, he and the United States attorney would work to have Maj Rust "removed individually" from the lawsuit. Capt Carranza testified that he explained to Maj Rust that "the way it usually happened would be that the U.S. attorney would move to have it dismissed and the United States substituted for him and that we would help him get the paperwork together." Although Capt Carranza did "not think" he "used the words 'best interest,' " he admitted that his summarized testimony at the Article 32, UCMJ, 10 USC § 832, investigation reflected that "I did tell him that I would be working in his best interest and that of the United States." Capt Carranza did not expressly tell Maj Rust that he was not his lawyer.

17. In the handwritten statement, Maj Rust wrote that he had given Airman Kieborz instructions regarding Mrs. S. Near the end of January, Capt Carranza talked to Airman Kieborz, who said that she had "never talked" to Maj Rust about Mrs. S. Airman Kieborz was concerned because Maj Rust "had approached her and told her that he was trying to get all his ducks in line." Capt Carranza went to the staff judge advocate (SJA) for guidance because "[i]t just seemed weird to me." The SJA advised Capt Carranza to "turn the matter over to Capt Lindemann," the chief of military justice at the base. Capt Carranza gave his copy of Maj Rust's statement to the Office of Special Investigations (OSI) in March, at their request. The military judge denied a defense request to suppress Maj Rust's oral and written statements to Capt Carranza. Granted Issues I and II of Maj Rust's cross-petition challenge this ruling.

18. On March 15, 1991, Maj Carey L. Winkler, M.D., Director of Obstetrical Services, Maternal Fetal Medicine, David Grant Medical Center, Travis Air Force Base, California, conducted a "Peer Review" of Mrs. S's treatment. Although Maj Winkler did not testify at the Article 32 investigation, he was interviewed by the defense as a possible witness. The defense did not formally request Maj Winkler as a witness until August 1, four days before the trial began, apparently because they thought Maj Winkler probably would be a prosecution witness. Trial counsel opposed the request for Maj Winkler, who was on leave when the court-martial commenced. The military judge denied the defense request to compel the attendance of Maj Winkler or to continue the trial until Maj Winkler's return from leave, on the ground that his testimony would be cumulative. Appellant now contends, in Granted Issue III, *see* Final Brief on Cross-Petition at 32, that the defense was deprived of Maj Winkler's testimony due to trial counsel's misconduct.

19. On April 29, 1991, defense counsel made a pretrial discovery request which included "[a]ny and all medical records

from the Valley Children's Hospital, Fresno, California (including those for "Baby Boy [S]")." Trial Counsel responded, "The medical records of [Mrs. S] have been provided. Please let us know if there is something you feel is missing." Defense counsel submitted an additional discovery request on July 31, 1991, requesting "[t]he autopsy or pathology report for the *placenta*." On August 1, 1991, trial counsel responded: "None" to this request.

20. After the trial, the defense discovered that there were five pathology slides from the deceased premature baby at the Valley Medical Center. Lt Col Bruce Banias, M.D., who had testified as an expert witness for the prosecution, submitted a post-trial affidavit after examining the slides, opining that nothing could have prevented the premature birth of Mrs. S's baby. The defense now asserts, in Granted Issue III, that trial counsel's failure to disclose the exculpatory slides was at least "merely negligent" and perhaps "a deliberate falsehood." *See* Final Brief on Cross-Petition at 29."

21. Maj Rust also asserts that trial counsel was overzealous and that his " 'win at any cost' attitude permeated the case and was specifically commented upon by other witnesses." Final Brief on Cross-Petition at 38. He submitted two post-trial affidavits in support of this assertion.

22. The first affidavit is from the same Maj Winkler whose unavailability at trial is attributed by Maj Rust to prosecutorial misconduct. Maj Winkler quotes trial counsel as saying to him, "I think Dr. Rust is a bad doctor and I am out to get him."

23. A second affidavit, from Colonel J. Eric Christman, M.D., recites the following:

> [a] The Air Force prosecutor seemed to be carrying a vendetta against Dr. Rust. He intimidated my staff and seemed to depart from a fact finding mission into a demonstration of power. The prosecutor's ap-

proach was a threatening attitude rather than a request for cooperation.

[b] When speaking of Dr. Rust, the Air Force prosecutor said something to the effect that "this guy's going to spend time in Leavenworth if I can help it.

24. The defense did not raise the issue of trial counsel's personal bias at the court-martial. The issue was raised before the Court of Military Review, which found "no evidence of overzealousness or a 'win at any cost' mentality on the part of the prosecutor." 38 MJ at 733.

Discussion

I. Admission of the Murder-Suicide Note

(Certified Issues I and II, Granted Issue IV).

25. RCM 1001(b)(4), Manual for Courts-Martial, United States, 1984, permits trial counsel to "present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." Such evidence "may include evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused." RCM 1001(b)(4), Discussion.

26. The defense argues that Maj Rust's dereliction was not the cause of Mr. A's deranged and criminal acts. The defense further argues that any probative value of the evidence is substantially outweighed by its inflammatory nature. Answer to Final Brief on Certified Issues at 17. The Government argues that RCM 1001(b)(4) is satisfied if Maj Rust's acts can reasonably be shown to have contributed to the murder-suicide. Final Brief on Certified Issues at 16-18.

27. The phrase "directly relating to or resulting from the offenses" imposes a "higher standard" than "mere relevance."

United States v. Gordon, 31 MJ 30, 36 (CMA 1990). Evidence is admissible on sentence which shows "the specific harm caused by the defendant." *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608 (1991). Nevertheless, an accused is not "responsible for a never-ending chain of causes and effects." *United States v. Witt*, 21 MJ 637, 640 n. 3 (ACMR 1985), *pet. denied*, 22 MJ 347 (1986). Evidence qualifying for admission under RCM 1001(b)(4) must also pass the test of Mil.R.Evid. 403, Manual, *supra; see United States v. Wilson*, 35 MJ 473, 476 n. 5 (CMA 1991). A "military judge has wide discretion" in applying Mil.R.Evid. 403. *United States v. Yanke*, 23 MJ 144, 145 (CMA 1987).

28. Applying the foregoing principles, we hold that the Court of Military Review did not err in holding that the military judge abused his discretion by admitting the murder-suicide note. The Court of Military Review's finding of fact concerning causation, *i.e.*, that the murder-suicide was "the independent result of [Mr. A's] disturbed mind," is amply supported by the record. *See* 38 MJ at 734.

29. Furthermore, even assuming *arguendo* that Mr. A's criminal acts were logically connected to the crime, the connection is too indirect to satisfy the requirement of RCM 1001(b)(4) that the consequences be "directly relating to or resulting from" Maj Rust's dereliction of duty. Finally, we agree with the court below that any such connection is too tenuous when balanced against the prejudicial impact of indicating that Maj Rust caused three deaths. 38 MJ at 374. *See* Mil.R.Evid. 403. Accordingly, we hold that the court below did not err, and we answer the first certified question in the negative.[1]

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[1] If, as represented by Maj Rust with respect to Granted Issue III, there is evidence that the premature birth of the baby was inevitable, then the murder-suicide is even more tenuously related to Maj Rust's dereliction of duty.

30. Like the court below, "We cannot say with any degree of certainty what sentence the court would have adjudged absent this highly inflammatory exhibit." 38 MJ at 734. Accordingly, we hold that the court below did not err by failing to find the error harmless, and we answer the second certified question in the negative.

II. Admission of Maj Rust's Notes

A. Lawyer-Client Privilege (Granted Issue I)

31. Maj Rust contends that his handwritten notes are protected by the lawyer-client privilege. He asserts that Capt Carranza led him to believe that he was his lawyer and that anything Maj Rust told him would be kept in confidence. Final Brief on Granted Issues at 4. The military judge ruled that Maj Rust had no reasonable basis to believe that he and Capt Carranza had formed a lawyer-client relationship. We hold that the military judge's finding that there was no lawyer-client relationship is supported by the record and not clearly erroneous.

32. Mil.R.Evid. 502(a) provides: "a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. . . ." Mil.R.Evid. 502(b)(1) defines a "client" as "a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer." Mil.R.Evid. 502(b)(4) provides: "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."

33. "The part invoking the attorney-client privilege has the burden of proving that" the lawyer-client "relationship existed

and that the communications" in question "were confidential." *United States v. Schaltenbrand,* 930 F.2d 1554, 1562 (11th Cir. 1991). To be protected by the privilege, the communication must be made to the lawyer "confidentially, in his professional capacity, for the purpose of securing legal advice or assistance." *Id., quoting United States v. Ponder,* 475 F.2d 37, 39 (5th Cir. 1973). The pivotal question is "whether the client reasonably understood the conference to be confidential." 930 F.2d at 1562, *quoting Kevlik v. Goldstein,* 724 F.2d 844, 849 (1st Cir. 1984) (quoting McCormick on Evidence, § 91 at 189 (1972)).

34. Whether a lawyer-client relationship existed when a communication to a lawyer was made is a question of fact. *United States v. Gandy,* 9 USCMA 355, 361, 26 CMR 135, 141 (1958); *United States v. Costanzo,* 740 F.2d 251, 254 (3d Cir. 1984). In determining whether the lawyer-client privilege protects the communication in question, the military judge should result any doubt "in favor of the accused." *United States v. Gandy, supra.* Once made, the military judge's determination should be upheld on appeal unless clearly erroneous. *United States v. Costanzo, supra* at 254.

35. We hold that the military judge's finding was not clearly erroneous. Since Maj Rust did not testify on the motion to suppress, the military judge did not have direct evidence of Maj Rust's subjective beliefs regarding his relationship with Capt Carranza.[2] However, the military judge did not turn his ruling on

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[2] We decline to consider Maj Rust's post-trial affidavit as evidence of his subjective beliefs. Maj Rust had an opportunity to testify on the motion to suppress but did not. We will not permit him to relitigate the motion by means of an *ex parte* affidavit offered for the first time on appeal. We are required to review the military judge's ruling on the admissibility of the evidence "on the basis of the evidence in the record of trial." *United States v. Penn,* 18 USCMA 194, 197, 39 CMR 194, 197 (1969). *See United States v. Vangelisti,* 30 MJ 234, 237 (CMA 1990) ("[T]he pertinent inquiry is the legal sufficiency of evidence *of record* supporting the judge's finding, not the existence of

Maj Rust's subjective beliefs but rather on the reasonableness of such beliefs. In this regard, the record reflects that Capt Carranza introduced himself as a lawyer for the hospital who was conducting a claims investigation. Maj Rust did not seek out Capt Carranza, ask him for advice, or receive any advice. Capt Carranza informed Maj Rust that his investigative file, including any information obtained from Maj Rust, would be disclosed to a "medical law consultant" and other technical experts, and then forwarded to "Headquarters Air Force." Accordingly, we conclude that the record supports the military judge's finding that there was no reasonable basis for Maj Rust to have concluded that he was providing confidential information to his lawyer.

B. Medical Quality Assurance Records (Granted Issue II)

36. Maj Rust also contends that his statements were protected by federal statute as part of the medical quality assurance program. Final Brief on Granted Issues at 23. The Government argues that Capt Carranza was not conducting a quality assurance inquiry when he spoke with Maj Rust. Answer to Final Brief on Granted Issues at 16. The Government argues further that even if Maj Rust's statements were obtained as part of a medical quality assurance inquiry, the statute authorizes disclosure in a criminal proceeding. *Id.* at 17. We hold that the military judge did not abuse his discretion by ruling that Maj Rust's statements were not protected by the medical quality assurance statute.

37. Generally, medical quality assurance records "are confidential and privileged." 10 USC § 1102(a). Such records may be

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evidence—or of potential evidence—supporting a contrary holding."). *Cf. United States v. Bethea*, 22 USCMA 223, 225, 46 CMR 223, 225 (1973) ("[F]actual determinations germane to a finding on the merits should be based on evidence that has been exposed to cross-examination or the right to cross-examine.").

disclosed, however, "[t]o a criminal or civil law enforcement agency or instrumentality charged under applicable law with the protection of the public health or safety," and may be used "[i]n an administrative or judicial proceeding commenced by a criminal or civil law enforcement agency." 10 USC § 1102(c)(F)-(G). The military judge found that Capt Carranza was not conducting a medical quality assurance inquiry during his meeting with Maj Rust. Furthermore, the military judge ruled that, even if Capt Carranza had been conducting a medical quality assurance inquiry, the statute did not protect Maj Rust's statements from disclosure in a court-martial. We hold that the military judge's finding is supported by the record and that his legal conclusion regarding the scope of any confidentiality afforded by the statute was correct.

III. Prosecutorial Misconduct

(Granted Issue III)

38. Our resolution of the certified issues moots the question whether trial counsel was guilty of misconduct by failing to disclose the evidence derived from the autopsy of the deceased baby or by causing the unavailability of the expert witness. Both sources of evidence were relevant only to sentencing. Maj Rust's dereliction of duty was completed when he failed to examine Mrs. S or admit her to the hospital. Since our resolution of the certified questions requires a sentence rehearing, the consequences of his dereliction may be litigated at that rehearing. The defense is now aware of the autopsy evidence and will be able to obtain and use such evidence if the Government attempts to show that Maj Rust was responsible for the baby's death. Likewise, the defense will have another opportunity to obtain expert testimony.

39. Finally, we reject the defense assertion that trial counsel's "win at any cost" attitude requires that the findings be set aside.

Although the asserted prosecutorial misconduct occurred prior to trial, the defense did not move to disqualify trial counsel. *See* RCM 502(d)(4) and (f). Accordingly, any issue whether trial counsel was so determined to convict and punish Maj Rust that he became an "accuser" (*see* Art. 1(9), UCMJ, 10 USC § 801(9)) was waived. RCM 905(e). To the extent that the affidavits demonstrate an aggressive, perhaps abrasive, attitude, there is no showing that trial counsel's attitude or conduct improperly affected the findings. *Cf. Wright v. United States*, 2 MJ 9 (CMA 1976) (defective appointment of trial counsel not jurisdictional; procedural defect must be tested for prejudice). The impact on sentencing is mooted for the reasons set out above.

Decision

40. The certified questions are answered in the negative. Granted Issues I and II are resolved against Maj Rust. Granted Issue III is mooted by our disposition of the certified questions and Granted Issue IV. Granted Issue IV is resolved in Maj Rust's favor.

The decision of the United States Air Force Court of Military Review setting aside the sentence is affirmed.

Judges COX, CRAWFORD, and WISS concur.

SULLIVAN, Chief Judge (concurring):

41. Appellant was tried by a general court-martial composed of officer members in August of 1991. Those officers found that appellant was derelict in his duties in violation of Article 92, Uniform Code of Military Justice, 10 USC § 892, based on the following allegations:

> SPECIFICATION: In that [the accused], who should have known his duties as the on-call physician in Obstetrics and Gynecology for the 93d Strategic Hospital, at or near Castle Air Force Base, California, on

> or about 25 December 1990, was derelict in the performance of his duties in that he negligently failed to report to the Emergency Room when required to do so, failed to personally examine Pamela Shelton, and failed to provide proper medical care to Pamela Shelton, as it was his duty to do.

42. This is another example where an officer's conduct in the military can be a crime, but in the civilian world his conduct would not be a crime. *See United States v. Lawson*, 36 MJ 415 (CMA 1993).

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 29629

UNITED STATES

v.

MAJOR ORION A. RUST, 154-46-4383
UNITED STATES AIR FORCE

24 August 1993

Sentence adjudged 10 August 1991 by GCM convened at Castle Air Force Base, California. Military Judge: William C. Thompson, Jr.

Approved sentence: Dismissal, fine of $5,000, and a reprimand.

Appellate Counsel for the Appellant: Mr. Michael E. Reheuser, Esq. (argued), Colonel Jeffrey R. Owens, Colonel Terry J. Woodhouse, Major Alice M. Kottmyer, Major Mary C. Yastishock, Captain David D. Jividen, Mr. Barry P. Steinburg, Esq.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise (argued), Colonel Richard L. Purdon, and Captain David C. Wesley.

Before

O'HAIR, McLAUTHLIN, and HEIMBURG
Appellate Military Judges

OPINION OF THE COURT

HEIMBURG, Judge:

This general court-martial raises the issue, among others, whether "dereliction in duty" encompasses medical malpractice, the failure of a military physician to meet the appropriate "standard of case."

Major (Dr.) Rust, a board-certified obstetrician-gynecologist, was convicted by a general court-martial sitting with members of negligent dereliction in duty and making a false official statement.[1] On appeal, he asserts 15 errors affecting both findings and sentence. We find no error affecting findings and affirm, but erroneous admission of a prosecution exhibit during presentence proceedings requires us to vacate the sentence.

THE CHARGES

Appellant was convicted of dereliction in duty in that he "willfully failed to report to the Emergency Room when required to do so, failed to personally examine [Ms. S], and failed to provide proper medical care to [Ms. S], as it was his duty to do." He challenges the legal basis for his charges, arguing "it is against public policy to prosecute a military physician for negligence committed in the course of medical treatment." As logical support for this assertion he cites the protection against civil suit afforded military physicians by 10 U.S.C. § 1089. In addition, he cites an unwritten "custom" against criminal prosecution in the Air Force and the resulting lack of constitutionally-required notice of the criminal nature of his conduct. We are unconvinced by appellant's arguments, finding his prosecution not barred by law, custom, or lack of fundamental due process. In our view, medical malpractice by an officer whose military

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[1] In violation of Articles 92 and 107, UCMJ, 10 U.S.C. §§ 892 and 907 (1988). The sentence of dismissal, a fine of $5000, and a reprimand was approved as adjudged.

duties require him to provide medical care may be punished as dereliction in duty under Article 92(3), UCMJ.

We begin by observing that nothing in the wording or history of Article 92, UCMJ, suggests it is an inappropriate vehicle for holding military medical professionals accountable for the proper performance of their duties. Appellant, nevertheless, points to the legislative history of 10 U.S.C. § 1089 (1988) as evidence of a legislative intent not to prosecute military physicians for simple negligence in the performance of medical duties.

10 U.S.C. § 1089, enacted in 1976, immunizes military physicians from personal liability for medical malpractice committed in the performance of their duties.[2] There is no mention of crime, criminal liability, or the Uniform Code of Military Justice in 10 U.S.C. § 1089. Since, on its face, this law does not touch on criminal responsibility, we resist appellant's invitation to examine its legislative history, as we find nothing in this enactment requiring our interpretation. Although appellant argues Congress could not have intended to immunize military physicians from civil liability but leave them liable criminally under the UCMJ for negligent medical treatment, we see nothing facially inconsistent in this state of affairs.

Appellant's second argument in support of his position that public policy bars his prosecution for dereliction in duty is a supposed unwritten "policy and custom" of the Air Force and

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[1] 10 U.S.C. § 1089 provides in pertinent part:

> (a) The remedy against the United States provided by [the Federal Tort Claims Act] for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician . . . of the armed forces . . . in the performance of medical, dental, or related health care functions . . . while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician . . . whose act or omission gave rise to such action or proceeding.

other military services. He cites no authority in support of this position, only the paucity of reported cases of dereliction in duty arising out of medical malpractice. We find this argument, based on the infrequency of *reported appellate decisions,* particularly unpersuasive. In light of the relatively minor nature of the offense of dereliction in duty,[3] one may reasonably infer that most instances of minor derelictions by officers are dealt with by measures other than court-martial, but that does not detract from their status as offenses under the Uniform Code of Military Justice. *See generally* R.C.M. 306(b) and Discussion thereto; MCM, Part V, paragraph 1e (1984).[4]

Appellant's third public policy argument is based on *Parker v. Levy,* 417 U.S. 733 (1974). He argues that he was not on notice that he could be prosecuted for medical malpractice, based on the infrequency of such reported cases and fact that malpractice is not addressed in the language of Article 92 itself. *Parker v. Levy* addressed whether the "general articles," Articles 133 and 134, UCMJ, were "void for vagueness" or "overbroad" and thus violative of the due process clause of the Fifth Amendment. The opinion never questioned whether a specific punitive article of the UCMJ, such as Article 92, might be "void for vagueness"

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[3] The maximum punishment for negligent dereliction in duty is forfeiture of two-thirds pay per month for 3 months and confinement for 3 months. MCM, Part IV, paragraph 16e(3) (1984). Officers are also liable to dismissal. R.C.M. 1003(b)(1)(A).

[4] Appellant also cites a footnote in a Navy-Marine Court of Military Review decision reversing a physician's conviction of negligent homicide. *United States v. Billig,* 26 M.J. 744, 747-48 n.1 (N.M.C.M.R. 1988). This footnote observed one reason the case was heard *en banc* was the assignment of error that "[i]t is against public policy to prosecute military medical personnel for negligent homicide committed in the course of medical treatment." The footnote questioned such prosecutions under Article 134, UCMJ, on a "due process" notice basis, citing *Parker v. Levy,* 417 U.S. 733 (1974). Apart from the fact the footnote was *dicta* in *Billig,* it is also arguably irrelevant to a prosecution for dereliction in duty under Article 92, UCMJ.

or "overbroad," and is no support for appellant's argument. As for the wording of Article 92, we readily agree with appellant it contains no mention of medical malpractice, but it mentions no other specific military duty, either. Article 92(3), UCMJ, simply provides,

> Any person subject to this chapter who—
>
> * * * * * * *
>
> (3) is derelict in the performance of his duties;
>
> shall be punished as a court-martial may direct.

The Court of Military Appeals recently upheld this simple negligence standard of criminality in the case of an officer convicted of dereliction arising from the nonperformance of military duties. *United States v. Lawson,* 36 M.J. 415 (C.M.A. 1993). We see no meaningful distinction to be drawn in this case, and find Article 92(3) was applied properly to appellant's conduct.

ATTORNEY-CLIENT PRIVILEGE

Appellant was convicted of making a false official statement to the base claims officer that he told Ms. S he wanted to admit her to the clinic, but she refused. By early January 1991, the events of Christmas Day 1990 had become the focus of some attention, and had been reported to the base claims office as a potential medical malpractice claim. Captain C was the newly assigned base claims officer.

Captain C testified his predecessor told him of the incident involving appellant and suggested investigation was required. On 3 January 1991, Captain C was at the clinic to pick up some medical records unrelated to this case. The clinic patient affairs administrator suggested Captain C should meet appellant, and took him to appellant's office for an introduction. Captain C told appellant he "was the hospital's lawyer" whose job was to

investigate potential claims under the Federal Tort Claims Act. He went on to describe the process of investigation and reports through legal and medical channels which would be involved. He and appellant discussed the events of 25 December. Appellant offered Captain C a statement he had previously written out, saying "he had been writing it all down so he could refresh his memory." Captain C photocopied the statement and returned it to appellant. As he learned more about the case in the next weeks, Captain C began to be concerned about the truthfulness of some matters in appellant's statement and turned the statement over to military investigators.

Appellant asserts all statements he made to Captain C are subject to attorney-client privilege, and were used against him in violation of Mil. R. Evid. 502. Whether such privilege protects appellant's statements depends on whether appellant's encounter with Captain C on 3 January 1991 created an attorney-client relationship. Mil. R. Evid. 502(b)(1) defines "client" for the purposes of the privilege as "a person . . . who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer." The test to be applied is subjective from the point of view of the person claiming to be a client, but that person's belief that a lawyer-client relationship has been created must be reasonable. *United States v. Henson*, 20 M.J. 620, 622 (A.C.M.R. 1985); Mil. R. Evid. 502(b)(2).

The trial judge made findings on this issue which we believe are fully supported by the evidence. He found that Captain C "clearly indicated to the accused that he was the claims officer conducting an investigation and that he represented the United States," and he "revealed the purpose of his investigation and the persons to whom it would be revealed" and "made no representations to the accused that he represented him." Accordingly, the trial judge found, and we concur, that appellant had "no reasonable basis . . . to have concluded that Captain C

represented him" and no attorney-client relationship existed. This assertion by appellant is without merit.

LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

Appellant asserts the evidence in the record is insufficient, legally and factually, to sustain the findings of guilty. The standards for our review of legal and factual sufficiency of the evidence are set forth in *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987):

> The test for the former is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court of Military Review are themselves convinced of the accused's guilty beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

Appellant was the on-call obstetrician-gynecologist at the Castle AFB clinic on 24 and 25 December 1990. Ms. S, a military dependent estranged from her husband, came to the Castle AFB clinic the evening of 24 December 1990. About 23-24 weeks pregnant, she complained of upper respiratory tract symptoms, vaginal bleeding, and that she felt as if the baby's head were "coming out." The emergency room physician, Dr. C, consulted appellant by telephone and gave Ms. S appellant's advice: get bed rest, meet her regular OB/GYN appointment, come back for an ultrasound, and if bleeding recurs, come back.

Ms. S came back Christmas night, again seeing Dr. C. She complained of cramping and spotting, and told the physician she

"felt" something in her vaginal opening. After examining her, Dr. C called appellant. The telephone conversation which ensued is the focus of both the dereliction and false official statement charges.

Dr. C testified he described Ms. S's symptoms to appellant, opined an ultrasound was needed to know where the placenta was, and suggested admission. Appellant told him there was nothing to be done, because the fetus wasn't viable. When he learned appellant didn't want to admit Ms. S, Dr. C told appellant he wasn't "comfortable" about the patient. Appellant told Dr. C he would speak with Ms. S, and Dr. C brought Ms. S to the telephone, where she spoke with appellant out of Dr. C's hearing. When they finished, Ms. S told Dr. C appellant said he would see her the next day. She then went home with her mother.

Mrs. B, Ms. S's mother, testified she accompanied Ms. S to the Castle AFB clinic both times. Ms. S told her on 25 December she wanted a "sonogram" or to be admitted to the hospital. Mrs. B did not overhear any of the telephone conversation Ms. S had with appellant, but she observed her daughter through a window as she talked. She testified Ms. S became visibly upset during the telephone conversation and began crying. After they left the clinic, Ms. S complained that "the doctor" would neither come to the clinic to see her nor admit her. Ms. S said "the doctor" told her, "Don't worry; I'll do all your worrying for you."

After Ms. S and her mother arrived home, Ms. S continued to believe something bad was happening to her, and telephoned the local civilian hospital, speaking with an obstetrical nurse. The nurse testified she tried to convince Ms. S to go back to Castle AFB, but Ms. S wanted to come to the civilian hospital, and the nurse agreed. Once Ms. S arrived, the emergency room staff called Dr. C for information about what he had done. Events happened rapidly thereafter: Ms. S began to show definite signs

of premature labor. The civilian hospital was no more capable of handling such an extremely premature delivery than the Castle AFB clinic, and, after beginning intravenous medication to stop labor, sent Ms. S by ambulance to a medical center in Fresno. There, all efforts to prevent delivery failed. The baby was born early 27 December 1990 and died the next day. Ms. S was killed by RA, her lover, in a murder-suicide on 29 or 30 December 1990.

Appellant's version of his telephone conversation with Ms. S differed significantly from that presented in the testimony of Mrs. B and corroborated by the civilian hospital nurse. His statement to Captain C, which he repeated at trial, was that he told Ms. S he wanted to admit her to the clinic for bed rest and observation, but she refused to be admitted.

A. DERELICTION IN DUTY

Appellant asserts his conviction of dereliction in duty must fall because of insufficient evidence that he violated any standard of care concerning Ms. S. Specifically, he argues: the prosecution established no duty to come to the clinic and admit Ms. S; experts testified he met the standard of care; and, any breach in the standard of care must lie with Dr. C, who was the initial care provider treating Ms. S.

We find no merit in any of appellant's arguments. The uniform testimony of the medical experts, including appellant, was that an obstetrician-gynecologist who assumed responsibility for a patient in Ms. S's condition was required either to come to the clinic and personally care for her to ensure that another qualified professional provide such care. His only relief from this duty was if the patient refused treatment. Appellant testified Ms. S would not wait at the clinic for him to come and examine her and, when he asked her to put Dr. C on the telephone so Dr. C could have her sign an "AMA" (against medical advice) form, they were disconnected. The crucial question thus presented to

the members was not whether a standard of care required appellant to personally attend Ms. S, but appellant's credibility when he testified he tried to meet that standard. The court members' findings of guilt indicate their disbelief of appellant's story. We find the evidence sufficient legally and factually to support their findings of guilt.

B. FALSE OFFICIAL STATEMENT

Appellant asserts the evidence is legally insufficient to sustain this conviction on two grounds: the statement he gave Captain C was an incomplete rough draft never adopted by him as a complete or accurate account of the events; and, the rough draft was not material and could not have influenced any official actions of the Air Force. We find against appellant on both grounds. At the time appellant gave Captain C the notes, he knew an official investigation was to be conducted into the incident and that his actions on 25 December 1990 had been questioned. He knew the standard of care by which his actions would be judged, and that the only basis on which he could avoid liability was patient refusal of care. From the evidence, a reasonable factfinder may infer appellant's statement to Captain C was given for the purpose of influencing the outcome of the potential malpractice investigation. Since his testimony at trial was substantially in accord with the contents of the rough draft charged as false, appellant's claim the account was incomplete and not adopted as accurate is not credible. We find the evidence legally sufficient to support appellant's conviction of making a false official statement.

The evidence also is factually sufficient to support appellant's conviction. Having weighed the evidence, we are convinced beyond a reasonable doubt that appellant willfully communicated a false statement, knowing the statement was false and material to Captain C's investigation.

TRIAL COUNSEL MISCONDUCT

Appellant alleges the trial counsel's improper conduct denied him a fair trial. Appellant alleges trial counsel withheld exculpatory evidence (a pathology report on Ms. S's fetus); misrepresented the availability of a potential defense expert witness and thereby ensured the witness would be denied when the defense finally requested the judge to order his appearance; and, throughout the pendency of the trial, exhibited an improper "win at any cost" attitude in violation of the applicable ethical standards. We find no merit in any of appellant's contentions.

Trial counsel answered "none" in response to defense pretrial discovery requests for "medical records . . . (including those for "Baby Boy [S]"). . . ." and for "[t]he autopsy or pathology report for the placenta." Appellant does not assert trial counsel's representations were false, but that trial counsel should have been able to subpeona "five pathology slides of [Ms. S's] fetus" because appellant obtained them post-trial, using the services of an independent civilian physician. Whether considered as a *Brady*[5] denial of due process issue or under the discovery rule of R.C.M. 701(a)(2), we find no prosecutorial misconduct. Assuming the defense discovery requests were sufficiently specific and that trial counsel had an obligation to attempt to obtain the slides by subpeona, we conclude appellant was not prejudiced by trial counsel's actions. Such evidence was not exculpatory, for it affected no element of the offense of dereliction with which appellant was charged. Neither was it impeachment or rebuttal information. At most, appellant asserts the slides would have convinced the government's expert that "nothing could have been done to prevent [Ms. S's] early delivery." This evidence may have had some materiality in sentencing, but failure of trial counsel to obtain it does not rise to the level of prosecutorial misconduct.

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[5] *Brady v. Maryland*, 373 U.S. 83 (1963).

Appellant next complains trial counsel acted intentionally to ensure Dr. W, an expert in obstetrics and gynecology, was denied to the defense. He did so, appellant complains, by first assuring the defense he would call Dr. W as a witness, then telling Dr. W to go on leave because he was unneeded, and, finally, opposing a defense motion to produce Dr. W by "false and misleading" statements to the court. We have carefully examined the record and find no "false and misleading" statements by trial counsel during litigation of the defense request for Dr. W at trial. There is, further, no evidence the defense requested Dr. W before trial counsel told Dr. W he was free to go on leave, and we are not persuaded trial counsel assured defense counsel Dr. W would be present at trial.

Appellant's final assertion of prosecutorial misconduct is that trial counsel had a "win at any cost" attitude which permeated the entire trial and deprived him of the right to a fair trial. Our examination of the record shows a lengthy, hotly contested trial, but no evidence of overzealousness or a "win at any cost" mentality on the part of the prosecutor. In sum, we do not find evidence of prosecutorial misconduct in this case.

INEFFECTIVE ASSISTANCE OF COUNSEL

Closely allied with his claim of prosecutorial misconduct is appellant's claim that his trial defense counsel were ineffective "as a matter of law." In order to prevail on a claim of ineffective assistance of counsel, appellant must establish both ineffectiveness and prejudice. *Strickland v. Washington,* 466 U.S. 668 (1984); *United States v. Scott,* 24 M.J. 186 (C.M.A. 1987).

Appellant argues his claim of ineffectiveness on four bases. First is failure to locate or interview Ms. S's husband, who would have testified she hated military medical care, thus corroborating appellant's testimony about the telephone conversation with Ms. S on 25 December. The remainder are: court member instructions proposed by the defense which were "le-

gally defective" because they used the simply negligence standard of civil liability; agreement to a stipulation of fact about the death of Ms. S; and, failing to call appellant to testify about the attorney-client relationship with Captain C.

Affidavits of trial defense counsel, rebutted by affidavits of appellant, defend the alleged failures as valid tactical decisions. As noted above, the trial was lengthy, taking most of 6 days. Appellant's trial defense counsel vigorously and extensively litigated many of the issues raised on appeal and several others, winning acquittal of one specification of false official statement and a finding of guilt of a lesser offense of the willful dereliction charged. Considering the state of the law and the evidence at trial, we are not convinced appellant's trial defense counsel fell short of the standards expected of counsel in any material respect. Finding no ineffectiveness, we reject this asserted error.

DENIAL OF DEFENSE EXPERT WITNESS

Prior to entering the pleas, trial defense counsel moved to compel the production of Major (Dr.) W as an expert witness. Trial counsel opposed the motion as untimely and argued the testimony of Major W would be cumulative with that of Colonel (Dr.) T, an expert witness previously granted the defense. The military judge ruled the defense motion "only marginally" timely, but denied it because Major W's testimony would be cumulative with that of Colonel T.

Appellant asserts the judge abused his discretion in denying the defense Major W. His arguments are the same as at trial: Major W's testimony was noncumulative because, although both he and Colonel T reached the same opinion on the standard of care concerning Ms. S, Major W approached the issues from a materially different vantage point. Colonel T had performed the "medical incident investigation" for quality assurance and risk management purposes, while Major W was called on to do a "peer review" of appellant's work. Another significant factor,

appellant argues, is that Colonel T was subject to impeachment for bias due to a previous prosecutorial action against him (no such cross-examination occurred at trial).

Military defendants have the right to compelled attendance of witnesses whose testimony is relevant and necessary. Article 46, UCMJ; R.C.M. 703(b)(1). A trial judge's ruling denying personal attendance of a witness is reviewed for abuse of discretion. *United States v. Tangpuz*, 5 M.J. 426, 428 (C.M.A. 1978). As we review the trial judge's decision, we observe that the concept of "cumulative" testimony involves the exercise of judgment as to the weight to be accorded different witnesses. Rarely would two eyewitnesses to an alleged crime be considered cumulative. Here, however, the witnesses were not eyewitnesses; they were experts who had no personal knowledge of the events at issue, but could only give an opinion interpreting the actions of others. In this circumstance, we are unwilling to find abuse of discretion by the trial judge.

THE "SUICIDE" NOTE

Over vehement defense objection, the trial judge admitted Prosecution Exhibit 18 in the presentencing hearing as evidence in aggravation of the offense of dereliction in duty. *See* R.C.M. 1001(a)(1)(A)(iv). Prosecution Exhibit 18 is a stained, handwritten letter by RA, the putative father of Ms. S's child and her apparent murderer. The letter began, "She was hurting so bad because the baby died. She wanted to be with it and so did I." It continues about how much "we loved each other," but faced "rejection. . . . misery and unhappiness," apparently from RA's and Ms. S's families.

Appellant argues there is no nexus between appellant's conduct and the deaths of Ms. S and RA, so Prosecution Exhibit 18 is not admissible as "aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). We agree.

Victim impact evidence is admissible as evidence in aggravation, but must "directly relate to or result from the accused's offense"—in this case, appellant's negligent dereliction. *United States v. Gordon*, 31 M.J. 30, 36 (C.M.A. 1990). One may posit that appellant's dereliction led to the death of Ms. S's baby, a consequence in some dispute at trial, and that the baby's death gave Ms. S and RA great sorrow. In that sense, the murder-suicide which followed may "relate to" appellant's negligent conduct in some logical fashion. In another sense, however, which we find more persuasive, the deaths of Ms. S and RA were the independent result of RA's disturbed mind.

The standard for admission of evidence under R.C.M. 1001(b)(4) is "not the mere relevance of the purported aggravating circumstance to the offense." *Gordon*, 31 M.J. at 36. Instead, this rule requires that the evidence somehow be a consequence of the offense or relate directly to it. Prosecution Exhibit 18 fails to meet that test. The deaths of Ms. S and RA did not "directly relate to or result from" appellant's dereliction in duty. Moreover, Prosecution Exhibit 18 fails the test of Mil. R. Evid. 403, in that its probative value is far outweighed by the danger of unfair prejudice.

Having concluded the Prosecution Exhibit 18 was erroneously admitted, we must assess the impact. We cannot say with any degree of certainty what sentence the court would have adjudged absent this highly inflammatory exhibit. *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). A rehearing is required.

CONCLUSION

Appellant has raised a number of other issues. We have examined each carefully, along with arguments of counsel, and conclude they are without merit.

The approved findings of guilty are affirmed. The sentence is set aside. A rehearing may be ordered by the same or a different convening authority. If a rehearing is deemed impractical, a sentence of "no punishment" may be approved.

Senior Judges O'Hair and McLauthlin, who participated in this decision prior to their departure from the Court, concur.

[SEAL OMITTED]

OFFICIAL

/s/ Laura L. Green

LAURA L. GREEN
Clerk of Court
Air Force Court of Military Review